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IN THE

Supreme Court of the United States

THOMAS D. PINKS and BILLIE JO CAMPBELL,
Petitioners,

v.

NORTH DAKOTA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of North Dakota

BRIEF OF *AMICI CURIAE* PROFESSORS PAUL C. GIANNELLI, PAMELA R. METZGER, AND ANDREW E. TASLITZ, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE INNOCENCE PROJECT, AND THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA IN SUPPORT OF PETITIONER

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OTHER AUTHORITIES

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Blackstone, Sir William, 3 *Commentaries on the Laws of England* (1765-69 ed.), *available at* http://www.yale.edu/lawweb/avalon/blackstone/bk3ch23.htm 3, 4

Blumenthal, Ralph, *Double Blow, One Fatal, Strikes Police in Houston,* N.Y. TIMES, Oct. 30, 2003 15

Ellis, Rodney, Editorial, *Want Tough on Crime? Start By Fixing HPD Lab*, HOUSTON CHRON., Sept. 5, 2004 15

FIFTH REPORT OF THE INDEPENDENT INVESTIGATOR FOR THE HOUSTON POLICE DEPARTMENT CRIME LABORATORY AND PROPERTY ROOM (May 11, 2006), *available at* http://www.hpdlabinvestigation.org/reports/060511report.pdf 16

FOURTH REPORT OF THE INDEPENDENT INVESTIGATOR FOR THE HOUSTON POLICE DEPARTMENT CRIME LABORATORY AND PROPERTY ROOM (Jan. 4, 2006), *available at* http://www.hpdlabinvestigation.org/reports/060104report.pdf 15

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Friedman, Richard, *The Confrontation Blog, Shifting the Burden,* Mar. 16, 2005, *available at* http://confrontationright.blogspot.com/2005/03/shifting-burden.html 9

Giannelli, Paul C., *Criminal Discovery, Scientific Evidence, and DNA,* 44 Vand. L. Rev. 791 (1991)..... 6, 7

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Giannelli, Paul C., *Forensic Science,* 34 J. L. Med & Ethics 310 (2006) 7

Hanes, Stephanie, *Chemist Quit Crime Labe Job After Hearing, Papers Show; She Acknowledged Report Was Worthless In 1987,* BALT. SUN, March 19, 2003 19

Khanna, Roma & McVicker, Steve, *Fingers Pointed at HPD Crime Lab in Death Row Case,* HOUSTON CHRON., April 24, 2003..... 16

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Metzger, Pamela R., *Cheating the Constitution,* 59 Vand. L. Rev. 475 (2006)..... 5, 9 14

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QUALITY ASSURANCE AUDIT OF HOUSTON POLICE DEP'T CRIME LABORATORY—DNA/ SEROLOGY SECTION (Dec. 12-13, 2002), *available at* http://www.pdsdc.org/resources/dna/ QA_Audit_for_DNA_databasing_labs.pdf..... 15

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THIRD REPORT OF THE INDEPENDENT INVESTIGATOR FOR THE HOUSTON POLICE DEPARTMENT CRIME LABORATORY AND PROPERTY ROOM (June 30, 2005), *available at* http://www.hpdlabinvestigation.org/reports/050630report.pdf 16

INTEREST OF *AMICI CURIAE*

Amici Curiae in support of Petitioners are Professors of Law with expertise in issues of forensic science, criminal procedure, and constitutional law. *Amici* also include the National Association of Criminal Defense Lawyers ("NACDL"), a non-profit association of criminal defense lawyers with a national membership of more than 10,000 attorneys, the Public Defender Service for the District of Columbia ("PDS'), which represents indigent criminal defendants, and the Innocence Project, a leader in the exoneration of the wrongfully convicted, which, in the course of its work, has exposed some of the forensic science failures discussed in this brief.[1] As scholars training future practitioners and practitioners representing clients, *Amici* have a keen interest in knowing whether and how the Sixth Amendment's Confrontation Clause applies to state forensic examiner reports.[2]

In the wake of *Crawford v. Washington,* 541 U.S. 36 (2004), and *Davis v. Washington*, 126 S. Ct. 2266 (2006), the most widespread subject of controversy with respect to the confrontation guarantee concerns the constitutionality of allowing the prosecution to introduce state forensic examiner reports in lieu of live testimony so long as the defendant is able to subpoena the examiner to testify for the defense. This practice poses serious problems because it fundamentally alters the structure of a criminal trial, diminishes its truth-seeking function, and ultimately threatens the integrity of our

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[1] Accompanying this brief are letters of consent to its filing. No counsel for any party authored any part of this brief, and no person or entity, other than *Amici*, has made a monetary contribution to the preparation or submission of this brief.

[2] Professors Giannelli, Metzger and Taslitz have published extensively on topics related to the issues discussed in this brief, and Professor Taslitz is a former state prosecutor. NACDL has appeared as *amicus curiae* in *Crawford v. Washington*, 541 U.S. 36 (2004) and also appeared with PDS as *amicus curiae* in *Davis v. Washington*, 126 S. Ct. 2266 (2006).

criminal justice system. To delay comprehensive guidance will perpetuate confusion and facilitate injustice in a substantial number of criminal cases nationwide.

SUMMARY OF ARGUMENT

Amici support Petitioner's arguments in support of a Writ of Certiorari in full. *Amici* write separately to explain the practical import of the traditional construction of the right to confrontation in operation, where the prosecution must affirmatively present live witness testimony to sustain its burden of proof and the defense, absent a knowing and intelligent waiver, always has the opportunity to confront and cross-examine that witness as it sees fit, if it sees fit. Specifically, *Amici* explain how the traditional construction of the confrontation guarantee allocates risks, creates incentives, and ultimately promotes the truth-seeking function of a criminal trial.

Amici also write to alert the Court to the systemic problems with unreliable scientific data that coincided with the permissive practice under *Ohio v. Roberts*, 448 U.S. 56 (1980), of admitting at trial unconfronted, purportedly reliable information. The demonstrated fallibility of state forensic examiner evidence, particularly when it is regularly exempted from the rigors of adversarial testing, reinforces the importance of the questions presented by Petitioner and militates in favor of this Court's review.

REASONS FOR GRANTING THE PETITION

I. HOW THE CONFRONTATION GUARANTEE IS PROPERLY SATISFIED IMPLICATES THE FUNDAMENTAL WORKINGS OF OUR ADVERSARIAL CRIMINAL JUSTICE SYSTEM AND ITS TRUTH-SEEKING FUNCTION.

In *Crawford*, this Court decoupled the right to confrontation from hearsay rules and held that a defendant's right to confrontation was implicated whenever the prosecution

sought to introduce "testimonial" evidence. But the Court did not expressly resolve, because the issue was not squarely before it, *how* the confrontation guarantee may be satisfied.

Traditionally, the Confrontation Clause has been interpreted to require (absent a valid waiver[3]) that the prosecution "confront" a defendant "with" its witnesses in the prosecution's case-in-chief. U.S. Const. amend. VI. Under this construction of the confrontation guarantee, there are always a variety of factors that will impede the admission of erroneous, incomplete, or fraudulent evidence.

To begin with, the prosecution, in order to sustain its burden of proof, bears the risk of presenting inherently revealing, live testimony. Thus the prosecution, which presumably knows the strengths and weaknesses of its evidence and its witnesses, cannot, over defense objection, simply conduct a trial-by-affidavit, putting out-of-court written statements before the fact-finder that say no more and no less than the prosecution wants them to say. Rather, the prosecution is obliged to put a live witness on the stand and bear the risk that this witness may provide, even on direct, some information that is inconsistent with prior statements or otherwise unhelpful or damaging to the prosecution's case.

Relatedly, under the traditional system, when a defendant stands on his right to confrontation, there is always the *opportunity* for adversarial testing. Certainly, when the prosecution calls its witness to the stand, it fulfills a number of the components of the confrontation guarantee, including (1) "face-to-face" confrontation with the defendant, *Crawford*, 541 U.S. at 57; (2) open presentation of evidence "in the presence of all mankind," Sir William Blackstone, 3 *Com-*

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[3] The traditional system does not require confrontation in every case. It is always the prosecution's prerogative to ask the defense to stipulate to the admission of unconfronted out-of-court statements. However, if the defense declines such a request, the prosecution retains the burden of production and the defense the opportunity for cross-examination.

mentaries on the Laws of England *373 (1765-69 ed.),[4] and (3) the fact-finder's first-hand "opportunity [to] observ[e] the quality, age, education, understanding, behavior, and inclinations of the witness; in which points all persons must appear alike, when their depositions are reduced to writing." *Id.* at *374.

But most important in the context of this discussion, when the prosecution is required to call a witness to the stand, the defendant always has a real opportunity to challenge this evidence via cross-examination as he sees fit (if he sees fit). This opportunity bears no risk for the defendant because the defendant is not obligated to choose whether or how to question the prosecution witness until after that witness has testified on direct and after the prosecution has presumably obtained from the witness whatever inculpatory information the witness possesses. At this point, the defense can make an informed decision to cross-examine the prosecution witness to expose holes, inconsistencies, biases, or untruths in the witness' testimony. Alternatively, the defense may decide to forego cross-examination—for any number of legitimate reasons. It may be that the witness (a) now under oath, failed to testify in a way that materially hurts the defendant, or (b) actually testified poorly for the prosecution (and thus favorably for the defense), and might only qualify his answers on cross-examination, or (c) in anticipation of cross-examination, was so scrupulous in his testimony that cross-examination would only emphasize the strength of the prosecution's evidence.

And precisely because the traditional construction of the confrontation right ensures a routine and uniform opportunity for the defense to confront and cross-examine prosecution witnesses, it creates an incentive structure for the prosecution and its witnesses to ensure at every stage of the prosecution

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[4] *Available at* http://www.yale.edu/lawweb/avalon/blackstone/bk3ch23.htm.

that the evidence is accurate and reliable in order to limit defense opportunities for impeachment.

The spectre of cross-examination provides an incentive for the prosecution to present a complete warts-and-all picture of its case to "draw the sting" from any attempt at impeachment—which in turn allows the fact-finder to render its verdict with more complete information. Likewise, the combination of being face-to-face with the accused and the possibility of cross-examination will likely deter prosecution witnesses from over-statement and misleading omissions when they are on the stand, especially where they have been instructed that such tactics will likely only backfire. Pamela R. Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 501 n.122 (2006) (almost all state employees who may be called to testify in criminal trials receive training on how to be a good witness).

In addition, even before the prosecution's first witness takes the stand, the traditional system of confrontation and cross-examination gives prosecution witnesses prophylactic incentives to exercise greater care in the creation or maintenance of prosecution evidence—to set up and follow protocols that adhere to best practices, to ensure all staff are properly trained, to properly document everything, and to strive in all ways to operate in a manner that is beyond reproach—and thereby to minimize if not avoid entirely damaging impeachment. *See* Metzger, 59 Vand. L. Rev. at 501. Similarly, the spectre of cross-examination prompts good prosecutors to rigorously vet their cases—to strengthen those cases that do go to trial by thoroughly reviewing the evidence with their witnesses and ensuring that errors, omissions, and oversights will be addressed and remedied before the witness testifies in open court, and to dismiss cases based on flawed evidence before the trial ever begins.

In short, the very structure of the traditional conception of the confrontation guarantee promotes the truth-seeking function of a criminal trial. But a number of states, North Dakota among them, have endorsed a very different con-

struction of the right to confrontation whereby a defendant "waives" the right to confront prosecution witnesses if he fails to subpoena them to testify for the defense.[5] Under this "waiver"-unless-subpoena construction of the confrontation guarantee, the prosecution does not bear the risk of presenting live witness testimony. Rather, the prosecution may present out-of-court testimony in its case-in-chief, and it is the defendant that must decide whether to chance calling the prosecution's witnesses to the stand in the defense case to provide in-court testimony. This strategy is incredibly risky: the defendant must call a witness to the stand who he knows will provide some measure of inculpatory information, "invite her to repeat the damaging account, this time live in front of the jury, then try to shake her – and if he comes up empty-handed, try to explain to the jury why he bothered with the whole exercise." Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 Geo. L. J. 1011, 1037 (1998).

This risk is only heightened when the defense is forced to examine on direct a prosecution witness with little or no discovery. State forensic examiners often align themselves with the prosecution,[6] are unlikely to voluntarily speak to the defense prior to trial, and are unlikely to be ordered by courts to do so. *See, e.g., In re J.W.*, 763 A.2d 1129, 1134-37 (D.C. 2000) (defendant has no right to pretrial interview of

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[5] For the reasons discussed above, Amici question the legitimacy of such a "waiver." *See Brady v. United States*, 397 U.S. 742, 748 (1970) (waivers of constitutional rights must be knowing, intelligent and voluntary); *Halbert v. Michigan*, 125 S. Ct. 2582, 2594 (2005) (defendant could not waive right that state statute affirmatively denied).

[6] Maurice Possley et al., *Scandal Touches Even Elite Labs: Flawed Work, Resistance to Scrutiny Seen Across U.S.*, CHI. TRIB., Oct. 21, 2004 (lab analyst explains: "We work for the good guys. We're the white hats."); *see also* Paul C. Giannelli, *Criminal Discovery, Scientific Evidence, and DNA*, 44 Vand. L. Rev. 791, 799 nn.52 & 53 (1991) (vast majority of crime laboratories in the United States are under police control and only examine evidence submitted by law enforcement).

government chemist to determine whether or not to subpoena him to testify at trial). Moreover, the defendant may have little ability to learn more from other sources about the examiner and his actions in the case. The report itself is likely to be cursory. Paul C. Giannelli, *Criminal Discovery, Scientific Evidence, and DNA*, 44 Vand. L. Rev. 791, 803 (1991) (lab reports often merely "summarize[] the results of an unidentified test conducted by an anonymous technician") (internal quotation and citation omitted); *see, e.g.*, Pet. App. 19a (documenting only the "substance[s] found"— "Cannabis (Marijuana)" and "Resin of Cannabis (Marijuana)").[7] Moreover, the defendant's right to obtain discovery from the prosecution related to the examiner and his report may be unclear because normal discovery rules are unlikely to apply to a situation where the prosecution is not calling the author of the report to the stand.[8] Finally, these examiners may, in fact, be hostile to the defense, and yet, because they are

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[7] *See also* Paul C. Giannelli, *Forensic Science*, 34 J. L. Med. & Ethics 310, 315 (2006) (current rules requiring discovery of scientific reports generally do not specify the information that must be included; suggesting changes that require "(a) a description of the analytical techniques used in the test . . . (b) the quantitative or qualitative results with any appropriate qualifications concerning the degree of certainty surrounding them, and (c) an explanation of any necessary presumptions or inferences that were needed to reach the conclusions") (internal quotation and citation omitted).

[8] In jurisdictions that have patterned their discovery rules on the federal Jencks Act—*see, e.g.*, D.C. Sup. Ct. Crim. R. 26.2, W.Va. R. Crim. P. 26.2—the defendant who calls a prosecution witness to the stand receives nothing from the prosecution beforehand because the disclosure obligation mandated by the Jencks Act was established with our traditional adversarial process in mind. Thus, it prohibits disclosure of government witness statements and reports to the defense "until said witness has testified on direct examination in the trial of the case," 18 U.S.C. § 3500(a), and it mandates disclosure of statements to the defense "[a]fter a witness called by the United States has testified on direct examination." 18 U.S.C. § 3500(b); *see also* Fed. R. Crim. P. 26.2 (mandating disclosure of statements "on a motion of a party who did not call the witness").

ostensibly "neutral scientists" testifying for the defense, it may be difficult for the defense to persuade the Court to permit the use of leading questions.

Under these circumstances, very few defendants would blindly call a prosecution witness in the defense's case. Thus, as a practical matter, the offer of even some components of the traditional right to confrontation under the "waiver"-unless-subpoena rule is illusory. This construction of the confrontation guarantee ostensibly affords a defendant all but one (cross-examination) of the protections assured by the traditional confrontation right, and for that component, purports to offer the (poor) substitute of direct examination, but because of the manner it which it reallocates risks from the prosecution to the defense, it severely limits *any* opportunity for any sort of in-court, adversarial testing.

Even when the defense does gamble and blindly calls a prosecution witness in the "waiver"-unless-subpoena system, the questioning of this witness in the defense case is likely to be far less effective than cross-examination of the same witness in the prosecution's case-in-chief and has the potential to damage the defense in ways distinct from a failed cross-examination. Before the defendant can attempt to impeach the witness, he will have to establish the witness' credentials as an expert and elicit his damaging expert opinion. In so doing, there is always a danger that the jury will inaccurately perceive that the defense is vouching for the witness. *See* Robert J. Klonoff & Paul L. Colby, *Sponsorship Strategy: Evidentiary Tactics for Winning Jury Trials*, 36-37 (1990) (juries evaluate evidence by reference to the party introducing it; evidence unfavorable to a party is more damaging when the party introduces it than it is when the party's opponent introduces the same evidence). Additionally, the defendant may be prejudiced by the perhaps days delay between the prosecution's presentation of unconfronted hearsay and the defendant's in-court examination of the

declarant of this statement; it may simply be too late for effective impeachment because, by this time, "an impression of the jury has been made." *New York Life Ins. Co. v. Taylor*, 147 F.2d 297, 305 (D.C. Cir. 1945) ("only a lawyer without trial experience would suggest that the limited right to impeach one's own witness is the equivalent of that right to immediately cross-examination"); *accord* Richard Friedman, The Confrontation Blog, *Shifting the Burden*, March 16, 2005, *available at* http://confrontationright.blogspot.com/2005/03/shifting-burden.html. Similarly, where a defendant introduces the prosecution's evidence solely to challenge it, he may disrupt his attempt to focus the fact-finder on his affirmative defense presentation. *Id.*

For all of these reasons, the "waiver"-unless-subpoena construction of the confrontation guarantee creates strong incentives for a defendant *not* to exercise his right to confrontation, and concomitantly strong incentives for the prosecution to introduce as much of its evidence as possible through out-of-court statements and documentary evidence. While a defendant may waive the confrontation guarantee under either the traditional or "waiver"-unless-subpoena construction of that right, the latter construction forces more unknowing and involuntary waivers. Indeed, the cost-saving rationale for this "waiver"-unless-subpoena rule appears to be based on the premise that it will substantially reduce live testimony by forensic examiners. Metzger, 59 Vand. L. Rev. at 528-31.

But by making in-court confrontation an uncommon and irregular occurrence, the "waiver"-unless-subpoena construction of the confrontation right robs the adversarial system of many of the incentives that promote the truth-finding function of a criminal trial. The declarant of an out-of-court statement for the prosecution does not have the same incentives that are present under the traditional construction of the confrontation guarantee to cautiously and conscientiously create and preserve evidence from the outset in order to avoid the possi-

bility of impeachment. Rather, with statements submitted in writing, information can easily be spun, misrepresented, omitted or fabricated precisely because no follow-up questioning is afforded. And, if lightening strikes, and this prosecution witness is called to testify in the defense case, he does not have the same incentives to testify precisely and comprehensively about his actions. A hostile witness, who knows his adversary is asking questions blindly without meaningful discovery, may testify as he wishes with little fear that misrepresentations and obfuscations will be detected.

Likewise, when the prosecution has little or no expectation that its witnesses will ever have to take the stand, it has little or no incentive to scour its evidence and vet its witnesses. It simply makes no sense for the prosecution to go the extra mile to ensure that its proof is as strong as it can be if there is no realistic probability of adversarial scrutiny. This has the potential to be particularly problematic in the context of conclusory state forensic examiner reports. The prosecution will be less inclined to probe the bases for a report's conclusions—the methodology and protocols the examiner used—because without a realistic probability of confrontation, they will never become an issue at trial. And yet, because of this lack of scrutiny, the prosecution may unwittingly rely on conclusions that are faulty or without foundation. By the same token, the prosecution, which always has the incentive in our adversarial system to put the best gloss on its case, will not have the incentive to take the utmost care to screen out misstatements and overreaching by its witnesses. Finally, because the checks and balances of the adversarial system are severely weakened when in-court testimony is unlikely, the prosecution has no incentive at trial to voluntarily reveal potential inconsistencies or affirmatively explain problems or errors to "pull their sting."

Amici believe that the "waiver"-unless-subpoena construction of the confrontation right is wholly inconsistent with our adversarial system. *See Barefoot v. Estelle*, 463 U.S. 880, 899

(1983) (our "adversary system" is designed to "uncover, recognize and take due account" of the "shortcomings" of expert evidence); *see also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993) (endorsing "[v]igorous cross-examination" as a means of attacking scientific evidence). *Amici* urge the Court to grant review in this case to declare that the traditional method of fulfilling the confrontation guarantee is the only constitutionally acceptable method.

This issue goes well beyond the unconfronted admission of state forensic examiner reports. It is the nature of our adversarial system that the prosecution will constantly push to limit its confrontation obligations. Thus, the recognition by a number of states of any rule for state forensic examiners more lenient than one requiring the prosecution to present live testimony subject to cross-examination by the defense creates a dangerous slippery slope. If it is permissible to shift the risk of presenting live testimony to the defense and, as a practical matter, to so constrict the opportunity for in-court adversarial testing of live witnesses, then it would presumably no more offend the Constitution to allow the prosecution to prove its entire case by affidavit, no matter the precise type of out-of-court statement at issue. *See People v. McClanahan*, 729 N.E. 2d 470, 477 (Ill. 2000) (acknowledging this danger); *see, e.g., Starr v, State*, 604 S.E.2d 297, 299 (Ga. Ct. App. 2004) (permitting introduction of alleged victim's videotaped statement in lieu of live testimony where defense could have called her as a witness). In other words, the "waiver"-unless-subpoena rule threatens not only to undo the importance of the *Crawford* and *Davis* decisions, which reaffirmed importance of live testimony, in court, subject to cross-examination, but also to "dramatic[ally] change . . . the way we conduct criminal trials." Friedman, 86 Geo. L. J. at 1038. With such basic principles at stake, the Court's corrective intervention is urgently needed.

II. WHETHER STATE FORENSIC EXAMINER EVIDENCE IS TESTIMONIAL AND SUBJECT TO TRADITIONAL CONFRONTATION GUARANTEES IMPLICATES THE INTEGRITY OF OUR CRIMINAL JUSTICE SYSTEM.

Whether state forensic examiner evidence is testimonial and subject to confrontation under the traditional construction of that right implicates the integrity of our criminal justice system. We need only look back to recent history for proof. During the *Roberts* era, a defendant's right to confrontation and cross-examination of a prosecution witness was downgraded from a categorical constitutional guarantee to a highly arbitrary judicial determination of evidentiary reliability. At the same time, some states (erroneously) concluded that the mechanism for fulfilling the confrontation obligation, in the more limited instances that obligation was recognized under *Roberts,* could be altered in such a way as to further constrict the scope of the right. In particular, some states endorsed the use of purportedly inherently reliable forensic examiner reports in lieu of live testimony so long as a defendant had an opportunity to subpoena the examiner to testify. From the vantage of hindsight, the result was predictable; the *Roberts* era coincided with widespread crime laboratory failures around the country.

Lest history repeat itself, this Court should use Petitioner's case as a vehicle to expressly reject the permissive admission of unconfronted forensic evidence and affirm that the traditional strictures of the confrontation right regulate the admission of such evidence. Indeed, it is particularly urgent that the Court resolve this issue in the wake of *Crawford.* Again, it is characteristic of our adversarial system that its actors will always seek strategic advantage and thus the prosecution will seek to avoid the risk and hard work that attends in-court confrontation of its witnesses. Now that the *Roberts* regime has been rejected, reliance on a "waiver"-unless-subpoena construction of the confrontation guarantee

will be the prosecution's most attractive option for avoiding the rigors of its traditional confrontation obligations.

The ability to confront and probe scientific evidence is critical because it is often the most powerful evidence in the prosecution's arsenal, and is considered to be extremely reliable and persuasive by juries. In a survey of potential jurors in the District of Columbia, respondents said that, on a scale of one to ten, fingerprint and DNA evidence rated 8.3 and 9 respectively for general persuasiveness, and 8.6 and 9 for general reliability; likewise 94% of those polled deemed "important" laboratory and scientific tests performed by the government that provided favorable evidence to the defense, and 91% of those polled said that they would be concerned if the prosecution withheld this information from the defense. *See* Survey of D.C. Jurors conducted by the Public Defender Service in December 2003, questions 3, 6, 17, 20, 57, & 71.[9]

This reliance is potentially dangerous because this sort of evidence is no more immune to human error or bias than any other type of evidence. Thus, in the review of the first 74 DNA exoneration cases analyzed by the Innocence Project *one third* involved "tainted or fraudulent science." Barry Scheck et al., *Actual Innocence: When Justice Goes Wrong and How to Make It Right*, 365 (2003); *see also* Possley, *Scandal Touches Even Elite Labs* (examination of first 200 exoneration cases since 1986 revealed than "more than a quarter involved faulty crime lab work or testimony"). Indeed, our *Roberts*-era history suggests that forensic evidence, just like any other type of evidence, is more susceptible to human error and misrepresentation when it is shielded from confrontation.

During the *Roberts* era, the confrontation guarantee turned on judicial estimations of evidentiary reliability and in-court

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[9] The Survey is available at http://www.pdsdc.org/SpecialLitigation/SLDSystemResources/Brady%20Poll%20Results,%20December%202003.pdf.

confrontation was generally devalued. *See Roberts*, 448 U.S. 56. At the same time, the practice of allowing the prosecution to introduce a state forensic examiner's report against the accused as a substitute for the forensic examiner's live testimony gained currency and proliferated rapidly. Pet. at 25. Conclusory declarations about the results of a "wide range" of forensic tests—including drug tests, "DNA tests, microscopic hair analyses, fingerprint identifications, coroners' reports, [and] ballistics tests," were exempted from the strictures of the Confrontation Clause. Metzger, 59 Vand. L. Rev. at 479 n.12. Demonstrating the influence of *Roberts*, the oft-cited justification for the permissive use of these unconfronted forensic laboratory reports was their inherent reliability. *Id.* at 480 n.15.

Ironically, the *Roberts*-era attitude that confrontation was discretionary and dispensable for "reliable" evidence can only have created an atmosphere which facilitated the creation and admission of unreliable evidence at trial precisely because the work of state forensic examiners was largely insulated from meaningful scrutiny. It would be an overstatement to say that confrontation is the cure-all for faulty forensic evidence; there will always be some people who are willing to take the stand and affirmatively lie or withhold information that might expose their testimony to be falsely premised or unreliable. But in-court confrontation works in concrete ways to deter the creation and use in court of sloppy, inaccurate, or falsified forensic work. *See* Point I *supra*; *see also Crawford*, 541 U.S. at 61 (confrontation identified as the procedural mechanism through which "reliability *can best be* determined") (emphasis added).

And, in fact, the practice of insulating the work of state forensic examiners from the crucible of adversarial testing coincided with a disconcerting number of systemic laboratory errors and failures around the country. Flaws with the administration and operation of state forensic laboratories and the evidence they generated during this time have been

uncovered in virtually every state or locality in the country, as well as in the federal system, and are well-documented in Baltimore, Chicago, Cleveland, Los Angeles, Montana, Oklahoma City, Texas (Houston, Fort Worth, and West Texas), Virginia, Washington, and West Virginia. *See* Appendix of Sample Crime Laboratory Failures from Around the Country During the *Roberts* Era ("App. of Crime Lab Failures"). In these jurisdictions, the same types of human error that can undermine the reliability of any other type of evidence—overwork, inattention, bias, lack of training, outright dishonesty—compromised the reliability and probity of laboratory tests and the reports of those test results. *Id.*

The Houston Police Department Crime Laboratory is perhaps the paradigmatic example of a failed forensic agency. According to one state senator, "the validity of almost any case that has relied upon evidence produced by the lab is questionable." Rodney Ellis, Editorial, *Want Tough on Crime? Start by Fixing HPD Lab*, HOUSTON CHRONICLE, Sept. 5, 2004. Specifically, a state audit revealed a dysfunctional organization with serious contamination issues and an untrained staff using shoddy science, including poor calibration and maintenance of equipment, improper record keeping, and a lack of safeguards against contamination, and a leaky roof which flooded boxes of biological evidence.[10] Other problems were discovered with the toxicology, serology, and ballistics units of the lab.[11] In addition, several

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[10] *Quality Assurance Audit of Houston Police Dep't Crime Laboratory—DNA/Serology Section* (Dec. 12-13, 2002), *available at* http://www.pdsdc.org/resources/dna/QA_Audit_for_DNA_databasing_labs.pdf.

[11] *See* Ralph Blumental, *Double Blow, One Fatal, Strikes Police in Houston*, N.Y. TIMES, Oct. 30, 2003, at A23 ("The Houston police chief announced on Wednesday that he had shut down the Police Department's toxicology section after its manager failed a competency test . . . ."); *Fourth Report of the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room* at 3-4 (Jan. 4, 2006) *available at* http://www.hpdlabinvestigation.org/reports/060104report.pdf.

instances of "drylabbing"—that is, the fabrication of scientific results—were documented in the controlled substances division.[12] Further investigation revealed widespread problems, including inadequate documentation and a failure to follow generally accepted forensic science practices and laboratory procedures.[13]

West Virginia too provides a cautionary tale about the systemic problems that can render forensic evidence wholly unreliable. After the DNA exoneration of Glen Dale Woodall, the Prosecuting Attorney for Kanawha County requested a judicial investigation into the work of the serology department at the West Virginia Department of Public Safety; a separate investigation was also conducted by the American Society of Crime Laboratory Directors (ASCLD). *See In Re Investigation of West Virginia State Police Crime Lab, Serology Division*, 438 S.E.2d 501, 503 (W.Va. 1993). Both the Court and ASCLD found that the serologist involved in the Woodall case routinely overstated results, provided misleading statements about his results, failed to report exculpatory results, failed to follow-up on conflicting results, and reported scientifically impossible or

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(documenting "pervasive and serious problems with the quality of scientific work performed by the serologists, as well as with the presentation of the results obtained"); Possley, *Scandal Touches Even Elite Labs,* (firearms examiner misreported caliber of bullet in order to connect gun to defendant); *see also* Roma Khanna & Steve McVicker, *Fingers Pointed at HPD Crime Lab in Death Row Case*, HOUSTON CHRONICLE, April 24, 2003.

[12] *See Third Report of the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room* at 31-36 (June 30, 2005), *available at* http://www.hpdlabinvestigation.org/reports/050630report.pdf.

[13] *See Fifth Report of the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room* at 66-67 (May 11, 2006), *available at* http://www.hpdlabinvestigation.org/reports/060511report.pdf.

improbable results. They also found evidence that the serologist's supervisors ignored or concealed complaints about his work. Both concluded that laboratory operating procedures—which, among other things, did not require written documentation of methodology, lacked auditing requirements, lacked written protocols, and failed to follow accepted scientific protocols—"undoubtedly contributed to an environment within which [the serologist's] misconduct escaped detection." *Id.* at 504.

A guarantee of routine in-court confrontation might have averted problems like these. Confrontation might have prompted the crime laboratories in these jurisdictions to act with greater care from the outset. Part of the problem is that many of the lab failures documented above would not be discernable from state forensic examiner reports used by the prosecution. As noted above and as was the case below, *see* p. 7 *supra*, these reports often incorporate only the examiner's bare conclusions without providing any information about the tests performed, the manner in which tests were conducted, laboratory protocols, departure from these protocols and the reasons therefore, or error rates. Thus the act of writing the report does not require self-scrutiny by the examiner, and hence provides little incentive either to conduct tests properly and carefully or to report their results accurately. The expectation of in-court confrontation provides these incentives, however, and thus can reduce the susceptibility of this evidence to error.

If it did not preempt them, a guarantee of routine confrontation could have also prompted or hastened the in-court exposure of these systemic problems. The types of errors and problems that have been discovered – disregard for protocols in conducting lab tests, lack of meaningful protocols, falsification of credentials by forensic examiners, fabrication of test results, utilization of junk science techniques or other flawed forensic methodology, pro-government bias, misreporting of actual test results, *see* App. of

Crime Lab Failures—are the very types of mistakes and misconduct that the crucible of adversarial testing is generally designed to deter and reveal. A forensic examiner may think twice about making unsupported, inaccurate or false statements when testifying in open court. In addition, defense counsel has the opportunity with the examiner on the stand to contrast inadequate protocols and methodologies with best practices, expose error rates and bias, question training, and reveal all the inconsistencies and implausibilities inherent in testimony that lacks adequate foundation or contains actual falsehoods. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 447 (1995) (through cross-examination defense counsel could have "laid the foundation for a vigorous argument that the police had been guilty of negligence")[14]; *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986) (right to confrontation encompasses right to cross-examine prosecution witnesses for bias); *United States v. Davis*, 14 M.J. 847, 848 n.3 (A.C.M.R. 1982) (cross-examination of a "chemist may reveal the possibility of laboratory error due to the carelessness").

Without in-court confrontation, there is little assurance that defense counsel will be able to probe any of these matters effectively, if at all. Indeed, it is telling that, although the crime laboratory errors and problems documented above occurred almost exclusively in criminal prosecutions, they were uncovered largely outside of the criminal trial process. Often long after the fact, the unreliability of laboratory test results and reports relied on in criminal trials was brought to

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[14] The prosecution is obliged to turn over *Brady* information to defense counsel for this precise purpose. *Id.* at 446 n.15 (When "the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it."); *Smith v. Secretary of New Mexico Dep't of Corrections*, 50 F.3d 801, 830 (10th Cir. 1995) (*Brady* obligation encompasses information "would have been useful in discredit[ing] the caliber of the investigation").

light by media exposés, civil suits and post-conviction proceedings that afforded meaningful discovery, whistle-blowers, and innocence commissions examining the causes of wrongful convictions. *See* App. of Crime Lab Failures.

Even in the smaller subset of cases under *Roberts* where it was deemed necessary, in-court confrontation revealed laboratory errors and problems, thus demonstrating the very efficacy of adversarial testing to "beat[] and bolt[] out the Truth." *Crawford*, 541 U.S. at 62 (internal citation and quotation omitted). The cross-examination of a police chemist about her testing of blood evidence in a Baltimore County, Maryland case is illustrative. The chemist acknowledged that "she did not understand the science behind many of the tests that she performed," and "she did not perform a number of standard tests on the blood samples in the case." Stephanie Hanes, *Chemist Quit Crime Lab Job After Hearing, Papers Show; She Acknowledged Report Was Worthless In 1987,* Balt. Sun, Mar. 19, 2003, at B1. She also "agreed that other tests she had completed were useless" and "acknowledged that she had failed to record the results of some testing steps needed to ensure accuracy in blood typing." *Id.* Finally, she acknowledged at the conclusion of cross that, "as a result of all this" "there [wa]s not one finding, one result in this report that [wa]s usable" and that her "entire report . . . [her] entire analysis [wa]s absolutely worthless." *Id.*[15] Cross-examination had similarly beneficial results in *Ragland v. Kentucky*, 191 S.W.3d 569, 581 (2006), where an FBI bullet lead composition analyst was caught in a lie by defense counsel on cross-examination, confronted with her earlier statements, and eventually forced to admit that her prior statements were false.

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[15] This chemist also tested blood evidence in DNA-exoneree Bernard Webster's case, but the prosecutor opted not to call her as a witness because he "didn't want to complicate" the case by allowing the defense to conduct what he anticipated would have been "a nasty cross-examination." Hanes, *Chemist Quit Crime Lab, supra.*

Later, the analyst admitted, "[i]t was *only after the cross-examination at trial* that I knew I had to address the consequences of my actions." *Id.* (emphasis added).

The errors and failures of forensic evidence detailed above expose the bankruptcy of the argument that confrontation is unnecessary in the area of forensic science because of its inherent reliability. They also demonstrate how concerns about the "cost" of presenting live-witness testimony by forensic examiners are, at best, penny-wise and pound-foolish. Time away from the laboratory and transportation to the courthouse are not the only costs implicated. There are also real costs to a suspension of confrontation: wrongful convictions, attendant civil suits, loss of public trust, and, in some cases, the failure to apprehend the true perpetrator. *See In Re Investigation of West Virginia State Police Crime Lab, Serology Division*, 438 S.E.2d at 508 (systemic forensic failures "stain our judicial system and mock the ideal of justice under the law").

The recent and extensive history of laboratory errors and failures demonstrates why it is critical for this Court to determine post-*Crawford*, whether state forensic examiner evidence is testimonial and thus subject to the traditional strictures of the confrontation clause, a question this Court should expressly answer in the affirmative.

CONCLUSION

For all the reasons set forth above, the Petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX OF SAMPLE CRIME LABORATORY FAILURES FROM AROUND THE COUNTRY DURING THE ROBERTS ERA

Baltimore, Maryland: In Baltimore County, a county-employed forensic chemist resigned after acknowledging at a preliminary hearing in a murder case that she did not understand the science involved in her serology work, that she failed to perform standard tests in the case, and that she had failed to properly record her test results. *See* Stephanie Hanes, *Chemist Quit Crime Lab Job After Hearing, Papers Show; She Acknowledged Report Was Worthless In 1987*, BALT. SUN, March 19, 2003, at B1, *available at* 2003 WLNR 2015229. Police acknowledged an independent audit of her work was warranted after her testimony in the case of Bernard Webster came to light and was characterized as "within the definition of material perjury." *Id.* Webster spent twenty years in prison for rape before being exonerated by DNA evidence. *Id.*

Chicago, Illinois: Prompted by DNA exonerations, journalists have now uncovered many instances in which forensic examiners in the Illinois State Police crime laboratory in Chicago stretched lab reports so as to inculpate defendants who turned out to be innocent, in part because analysts in Illinois are funded by police agencies and state law mandates they serve the prosecution. *See* Steven Mills, et.al., *When Labs Falter, Defendants Pay*, CHI. TRIB., Oct. 20, 2004, at 1, *available at* 2004 WLNR 19847167. An independent review in connection with a civil case has uncovered many additional problems with the Chicago Police crime laboratory, including poor supervision, lack of protocols and inadequately trained staff. Maurice Possley, *et al.*, *Crime Lab Disorganized, Report Says Consultant Alleges Meager Supervision, Inadequate Training*, CHI. TRIB., Jan. 15, 2001, at 1, *available at* 2001 WLNR 10599710.

Cleveland, Ohio: In Cleveland, a state forensic examiner vastly overstated the importance of largely irrelevant serological test results, resulting in the wrongful conviction of Michael Green. The city agreed to settle Green's civil case for $1.6 million and a commitment to look into the 100 cases that included the same forensic laboratory worker who testified falsely at Green's rape trial. *See* Connie Schultz, *City to Pay $1.6 Million for Man's Prison Time*, PLAIN DEALER, June 8, 2004, at A1, *available at* 2004 WLNR 20474898.

Fort Worth, Texas: The Fort Worth Police Department's crime laboratory was forced to review almost 100 cases—three years' worth of DNA evidence—when a proficiency test revealed a senior forensic examiner did not follow proper procedures and protocols. Deanna Boyd, *Crime Lab Subject of Criminal Inquiry*, FT. WORTH STAR-TELEGRAM, April 13, 2003 at 1. The laboratory's work had been questioned but remained unaddressed for three years, despite additional issues of case backlogs, staff shortages and an "inadequate facility." *Id.*

Houston, Texas: The Houston Police Department Crime Laboratory was exposed in a series of investigative news reports that aired on KHOU–Channel 11, a local Houston television station. The story led to an audit, which revealed a dysfunctional organization with serious contamination issues and an untrained staff using shoddy science, including poor calibration and maintenance of equipment, improper record keeping, and a lack of safeguards against contamination, and a leaky roof which flooded boxes of biological evidence. QUALITY ASSURANCE AUDIT OF HOUSTON POLICE DEP'T CRIME LABORATORY – DNA/SEROLOGY SECTION (Dec. 12-13, 2002), *available at* http://www.pdsdc.org/resources/dna/QA_Audit_for_DNA_databasing_labs.pdf. Five reports were issued by the Independent Investigator of the Houston Police Department and Property Room between May 31, 2005 and

May 11, 2006 documenting extensive problems in nearly every division of the laboratory. *See, e.g.*, THIRD REPORT OF THE INDEPENDENT INVESTIGATOR FOR THE HOUSTON POLICE DEPARTMENT CRIME LABORATORY AND PROPERTY ROOM at 1 (June 30, 2005) *available at* http://www.hpdlabinvestigation.org/reports/050630report.pdf; FIFTH REPORT OF THE INDEPENDENT INVESTIGATOR FOR THE HOUSTON POLICE DEPARTMENT CRIME LABORATORY AND PROPERTY ROOM at 66-67 (May 11, 2006) *available at* http://www.hpdlabinvestigation.org/reports/060511report.pdf.

Western Texas: A contract medical examiner, Dr. Ralph Erdmann, who worked in more than 40 rural counties in Texas beginning in the early 1980s, and may have performed up to 400 autopsies a year, was convicted of seven felony counts (spanning three counties) of falsifying autopsies. Roberto Suro, *Ripples of a Pathologist's Misconduct in Graves and Courts of West Texas*, N.Y. TIMES, November 22, 1992 at 22, *available at* 1992 WLNR 3309847. Suspicion arose about Erdmann when he listed in an autopsy report the weight of a decedent's spleen—where relatives were aware the decedent's spleen had been removed years prior to his death. *Id.* A special prosecutor appointed to investigate the misconduct said even a narrow examination of Erdmann's conduct reveled around 100 faked autopsies in a single county. *Id.* The special prosecutor noted, "[i]f the prosecution theory was that the death was caused by a Martian death ray, then that was what Dr. Erdmann reported." Richard L. Fricker, *Pathologist's Plea Adds to Turmoil: Discover of Possibly Hundreds of Faked Autopsies Helps Defense Challenges*, 79 A.B.A.J. 24 (March 1993). In spite of this bias, Erdmann on several occasions determined individuals had died of natural causes when in fact they had been killed. *See, e.g.*, Geoffrey A. Campbell, *Erdmann Faces New Legal Woes: Pathologist Indicted for Perjury in Texas Murder Trial*, 81 A.B.A.J. 32 (November 1995); *Couple Indicted on Murder Charges*, DALLAS MORNING NEWS,

March 24, 1993, at 14D, *available at* 1993 WLNR 4862381. In addition, he also exaggerated his credentials, claiming to be a ballistics expert. Suro, *Ripples,* N.Y. TIMES, November 22, 1992 at 22, *available at* 1992 WLNR 3309847.

Los Angeles, California: In Los Angeles, a police chemist failed to follow basic protocols for drug tests: he did not weigh drugs separately from the containers in which they were seized. *See* Anna Gorman, *LAPD Narcotics Analyst Erred: Botched Evidence Raises Question on Credibility. Public Defender's Office Demands an Accounting*, L.A. TIMES, Sept. 2, 2004, at B1, *available at* 2004 WLNR 19731216. After the error was ultimately discovered in one case, a preliminary review of the analyst's prior work was conducted and revealed problems in 47 additional cases, and subsequently lead to a review of all 972 drug cases in which he was involved. *Id.* The chemist had started at the crime lab analyzing blood and urine evidence before moving to narcotics. *Id.*

Mississippi: A forensic dentist represented that he could "match" bite marks, tool marks, shoe prints, fingernail imprints, and knife wounds using a method he dubbed, after himself, the "West Phenomenon." Marcia Coyle, *"Expert" Science under Fire in Capital Cases; Daubert vs. Frye*, NAT. L.J., July 11, 1994, at A1. The "West Phenomenon" involved using an alternate light source to analyze the wounds; his methodology could neither be reproduced nor photographed. *Id.* The forensic dentist's misconduct was acknowledged two years after a defense attorney complained to the American Academy of Forensic Sciences, which found West misrepresented data to bolster the acceptance of his technique and that his testimony was misleading in its certainty as well as its methodology. *Id.* Other review boards thereafter criticized his testimony and his methodology. *Id.*

Montana: An exoneration revealed the faulty and invented statistical analysis for hair evidence by the founder and

director of the Montana state police crime laboratory had resulted in at least two additional wrongful convictions. An independent review board reviewed the examiner's testimony and concluded he had demonstrated a "fundamental lack of understanding" of hair comparisons. *See* Innocence Project, PEER REVIEW REPORT: *Montana v. Jimmy Ray Bromgard*, *available at* http://www.innocenceproject.org/docs/bromgard_print_version1.html; Adam Liptak, *States to Review Lab Work of Expert Who Erred On ID*, N.Y. Times, Dec. 19, 2002 at A24, *available at* 2002 WLNR 3550147. After his shoddy work was exposed in Montana, the Montana crime laboratory director moved to Washington to conduct drug analysis work. Ruth Teichroeb, *Counties to Be Told of Crime Lab Flaws*, SEATTLE POST-INTELLIGENCER, March 17, 2004, *available at* http://seattlepi.nwsource.com/local/165129_crimelab17.html. When his past became known, an internal review of his drug analysis work revealed additional methodology problems. The reviewer described the forensic work as "sloppy" and "built around speed and shortcuts." *Id.*

Oklahoma City, Oklahoma: In Oklahoma, in multiple criminal cases over the course of a decade, a forensic chemist failed to follow basic scientific method, misrepresented qualifications, contaminated evidence, misreported test results, withheld evidence from the defense, and drew conclusions beyond bounds of accepted science. *See McCarty v. State*, 765 P.2d 1215, 1218-19 (Ok. Ct. Crim. App. 1988); *McCarty v. State*, 114 P.3d 1089, 1093 n. 19 (Ok. Ct. Crim. App. 2005); *see also*, Special Agent Douglas Deedrick, *Summary of Case reviews Of Forensic Chemist, Oklahoma City Police Department Crime Laboratory* (April 4, 2001), *available at* http://www.pdsdc.org/resources/dna/Summary_of_case_reviews_for_Joyce_Gilchrist.pdf

Virginia: After an exoneration in Virginia, the governor directed the state laboratory to allow an audit by the American Society of Crime Laboratory Directors ("ASCLD"). The

audit found that crime laboratory examiners interpreted DNA tests erroneously, deviated from standard protocols, and were subject to pressure to reach results consistent with the prosecution case, rather than conducting neutral scientific analysis. *See* American Society of Crime Laboratory Directors, LIMITED SCOPE INTERIM INSPECTION REPORT OF THE VIRGINIA DIVISION OF FORENSIC SCIENCE CENTRAL LABORATORY (April 9, 2005), *available at* http://www.innocenceproject.org/docs/VA_ASCLD_Audit_Report.pdf; Steve Mills, *Top Lab Repeatedly Botched DNA Tests*, CHI. TRIB., May 8, 2005, at 8, *available at* 2005 WLNR 23379927 (describing American Society of Crime Laboratory Directors Report).

Washington: A review by journalists of various Washington state crime laboratories found multiple instances of contamination, sloppy reporting techniques, the use of "junk science," bias in favor of law enforcement, influence of law enforcement over laboratory workers, and concealment of botched tests at various Washington state patrol laboratories. *See* Ruth Teichroeb, *Rare Look Inside State Crime Labs Reveals Recurring DNA Test Problems*, SEATTLE POST-INTELLIGENCER, July 22, 2004, available at http://seattlepi.nwsource.com/local/183007_crimelab22.html; Ruth Teichroeb, *Oversight of Crime-Lab Staff Has Often Been Lax*, SEATTLE POST-INTELLIGENCER, July 23, 2004, *available at* http://seattlepi.nwsource.com/local/183203_crimelab23.html; Ruth Teichroeb, *Crime Labs Too Beholden to Prosecutors, Critics Say*, SEATTLE POST-INTELLIGENCER, July 23, 2004, *available at* http://seattlepi.nwsource.com/local/183227_labsolutions23.html.

West Virginia: After the DNA exoneration of Glen Dale Woodall, and the insurance investigation which resulted in a settlement of $1 million in Woodall's civil suit for false imprisonment, the Prosecuting Attorney for Kanawha County requested a judicial investigation into the work of the

serology department at the West Virginia Department of Public Safety; a separate investigation was conducted by the ASCLD. *See In Re Investigation of West Virginia State Police Crime Lab, Serology Division*, 438 S.E.2d 501, 503 (W.Va. 1993). The judge found misconduct on a massive scale: the serologist, Fred Zain, routinely overstated results, provided misleading statements about his results, failed to perform tests he claimed to have performed, failed to report exculpatory results, failed to follow-up on conflicting results, reported scientifically impossible or improbable results, and altered laboratory reports. *Id.* at 503. And his misconduct always favored the prosecution: the ASCLD team found, "when in doubt, Zain's findings would always inculpate the suspect." *Id.* at 512 n. 9. Contributing to the misconduct was the fact that Zain's supervisors ignored or concealed complaints about his work. *Id.* at 503-4. The ASCLD also concluded that laboratory operating procedures—which, among other things, did not require written documentation of methodology, lacked auditing requirements, lacked written protocols, and failed to follow accepted scientific protocols—"undoubtedly contributed to an environment within which [the serologist's] misconduct escaped detection." *Id.* at 504. After citing "shocking and . . . egregious violations" and the "corruption of our legal system," the judicial inquiry concluded, "as a matter of law, any testimonial or documentary evidence offered by Zain at any time in any criminal prosecution should be deemed invalid, unreliable, and inadmissible." *Id.* at 506, 508, 520.

Federal Bureau of Investigations Crime Laboratory: Allegations of wrongdoing and improper practices within the FBI by Supervisory Special Agent Frederic Whitehurst involving some of the most significant prosecutions of the 1990s prompted the Office of Inspector General to investigate the nation's most respected crime laboratory. *See*, OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF JUSTICE, THE FBI LABORATORY: AN INVESTIGATION INTO LABORATORY PRAC-

TICES AND ALLEGED MISCONDUCT IN EXPLOSIVES-RELATED AND OTHER CASES (April 1997), *available at* http://www.usdoj.gov/oig/special/9704a/index.htm ("1997 I.G. Report"). "FBI examiners had given scientifically flawed, inaccurate, and overstated testimony under oath in court; had altered the lab reports of examiners to give them a pro-prosecutorial slant, and had failed to document tests and examinations from which they drew incriminating conclusions, thus ensuring that their work could never be properly checked." John F. Kelly & Phillip K. Wearne, TAINTING EVIDENCE 2 (1998); *see also,* 1997 I.G. Report, Executive Summary, part I, section A.

The FBI laboratory and analysts have been criticized in divisions ranging from fingerprint analysis (for example, the FBI misidentification of Brandon Mayfield, a Portland, Oregon, lawyer as a perpetrator of the Madrid terrorist attack of March 11, 2004, Flynn McRoberts & Maurice Possley, *Report Blasts FBI Lab: Peer Pressure Led to False ID of Madrid Fingerprint,* CHI. TRIB., Nov. 14, 2004, *available at* 2004 WLNR 19808891), to comparative analysis of bullet lead (William A. Tobin & Wayne Duerfeldt, *How Probative is Comparative Bullet Lead Analysis?*, 17 CRIM. JUSTICE 26 (Fall 2002) (retired FBI examiner began questioning the scientific technique of bullet lead composition analysis)).

A 2004 Report by the Office of Inspector General focused on Jacqueline Blake, who worked in the DNA unit for two years after having worked in the serology division for the ten previous years. OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF JUSTICE, THE FBI LABORATORY: A REVIEW OF PROTOCOL AND PRACTICE VULNERABILITIES, (May 2004), *available at* http://www.usdoj.gov/oig/special/0405/final.pdf ("2004 I.G. Report"). In May 2004, she pleaded guilty to a misdemeanor charge of providing false information in her lab reports. Maurice Possley, et. al., *Scandal Touches Elite Labs,* CHI. TRIB., October 21, 2004 at 1, *available at* 2004 WLNR 19853005. Significantly, although the FBI lab was accredited

and subject to audits, it was not an audit that discovered Blake's malfeasance—rather, a colleague who was working late one night accidentally discovered Blake's inconsistent and improper documentation. 2004 I.G. Report, Executive Summary at ii.

Drug Enforcement Agency: Veteran chemist Anne Castillo of the Dallas, Texas, Drug Enforcement Agency Laboratory, which analyzes evidence for state and federal agencies in Texas, Alabama, Arizona, Louisiana, Mississippi, New Mexico and Oklahoma, admitted in 1996 to fabricating results and providing testimony for tests never performed. Peter Schoenburg & Steve McCue, *Controlled Substances*, 20 CHAMPION 34 (Dec. 1996). While DEA director Howard Schlesinger confirmed Castillo had fabricated test results for at least several months – affecting hundreds of cases – he admitted there was no way to determine for how long she had been doing so, as she had been with the laboratory for many years, and worked on a full range of controlled substance cases. *Hundreds of Drug Cases May Be in Jeopardy*, DALLAS MORNING NEWS, July 19, 1996, page 34, *available at* 1996 WLNR 6022514.